IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95877
	)	
	)	
JEFFREY L. BRUNER,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
THE HONORABLE GAYLE L. CRANE, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977, ext. 323
FAX (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

Page

***RULES*:**

***OTHER*:**

JURISDICTIONAL STATEMENT

Appellant, Jeffrey Bruner, was convicted following a jury trial in the Circuit Court of Jasper County of murder in the first degree, Section 565.020, and armed criminal action, Section 571.015.[1] The Honorable Gayle L. Crane sentenced him to life without the possibility of parole and a concurrent term of five years imprisonment. The Court of Appeals, Southern District affirmed appellant's conviction *en banc* and then transferred this cause to this Court. This Court has jurisdiction pursuant to Rule 83.02 and Article V, Section 10, Mo. Const.

[1] Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Appellant, Jeffrey Bruner, was charged by information filed in the Circuit Court of Jasper County with murder in the first degree and armed criminal action (L.F. 21-22). This appeal involves the denial of appellant's proffered self-defense instruction. The facts will be presented, in accordance with this Court's standard of review, in the light most favorable to the giving of that instruction.[2]

Michelle and Jeff Bruner were married in 1992 (Tr. 452-453, 556). They had a son and a daughter, Wyatt and Alexis (Tr. 453-455, 557). The family moved around while Jeff was in the Air Force and ultimately settled in Joplin (Tr. 455, 557-558). Michelle became a police officer during this time; she also had several extramarital affairs and moved in and out of the marital home (Tr. 457-462, 562-565). She decided to end the marriage in November 2012, but did not tell Jeff until the following year (Tr. 462-471). She moved out in October 2013; she had already started a relationship with Derek Moore (Tr. 471-472, 567).

Jeff did not want people to know that they were separated (Tr. 476). He especially did not want it known at church, because he thought Michelle would come back to him (Tr. 476).

The evening of November 1, Michelle made plans to go to a movie with Derek (Tr. 477). They had dinner and went to the theater (Tr. 477). Derek had a

[2] ***State v. Weems***, 840 S.W.2d 222, 226 (Mo. banc 1992).

woman sitting nearby take a picture of them on his phone (Tr. 477-479). He uploaded it to Facebook, and tagged Michelle in the picture (Tr. 479).

Alexis had also been to the movies that day (Tr. 245, 573). Jeff picked her up and they went to McDonalds (Tr. 245, 573-574). Alexis looked at her phone, and saw the picture of her mother and Derek, captioned "Date night" (Tr. 246-247, 575). She showed it to Jeff, who was "stunned" (Tr. 248-249, 575). They picked up their food and went home (Tr. 249, 576).

When they got home, Jeff asked Alexis if he could see the picture again on her laptop (Tr. 251, 579). She showed it to him, and he left the house (Tr. 252, 579). He took two guns because the man in the picture was big (Tr. 581-584). He later texted Alexis and asked her if she was okay, and asked her what her mother was wearing (Tr. 252, 590).

Jeff parked and waited for Michelle and Derek to come out (Tr. 586). When he saw them coming out, he approached (Tr. 592-593). According to Jeff, Michelle said "I don't need your permission" to be "on a date" (Tr. 593). Derek said "she moved out, pal" (Tr. 594). He moved in close, and Jeff stepped back (Tr. 594). When Jeff asked Michelle how she could put this on Facebook for their daughter to see, Derek again moved toward Jeff, who is 5'10", saying "who the fuck are you" (Tr. 594).

Derek, who was 6'4" or 6'5" and a football coach at Missouri Southern State University, kept cursing and approaching, and Jeff kept stepping back (Tr. 595). Jeff kept trying to talk to Michelle, and Derek kept interrupting (Tr. 595).

Derek said "I'm not from here, mother fucker, I'll have your throat slit in two hours" (Tr. 598-599, 625).

Derek stepped up onto the median, which Jeff remained on the asphalt (Tr. 599, 638). Jeff asked, "[W]hy are you threatening me?" Derek replied, "I don't play these redneck games." (Tr. 599). According to Jeff, he saw "some kind of motion right before the shots were fired … I know there was some kind of motion that he made." (Tr. 629). Derek took what Jeff called a "fighting stance … sideways looking at" Jeff, with Derek's right shoulder closer to Jeff and Jeff "saw his right arm move" (Tr. 638). Jeff thought that Derek was trying to grab him and he backed up (Tr. 638-639). Derek said, "you don't know who the fuck you are messing with" (Tr. 626, 638).

Jeff testified that he remembered seeing the gun come out and seeing one or two shots and hearing three (Tr. 600). It was as if everything started closing in on him (Tr. 600). His vision went and he felt sick; he did not have a clear memory of the shooting or what followed (Tr. 600-602). The next thing he remembered was sitting in the car holding the steering wheel (Tr. 602). He did not plan to kill Derek; he just wanted to talk to his wife and save their marriage (Tr. 603-604).

Michelle testified that when she and Derek left the theater, Jeff approached them and asked why she would post that to Facebook (Tr. 479). Derek stepped in, and there was an argument between him and Jeff (Tr. 480). Derek was "cussing pretty bad," saying "fuck you" to Jeff (Tr. 480-481). Michelle tried to step between them (Tr. 481). Derek stepped up on the concrete divider, and turned

back to say to Jeff, "you don't know who the fuck you're messing with" (Tr. 482). According to Michelle, the shots were fired immediately after (Tr. 482).

Darrell Darryberry was at the movies that night and saw the altercation (Tr. 489-490). A smaller man was saying, "I just want to talk to her" and a bigger, heavier man was saying "not tonight, she's with me, we're on a date" (Tr. 490).

Samantha Hughes, who worked at the theater, noticed Jeff parked and waiting for the movie to get out (Tr. 282-284). She next saw him with his hand out, heard gunfire, and saw him doing a stomping motion (Tr. 285). The incident was also witnessed by Paul Smith, who heard Jeff say, "twenty-one years of marriage and this is what it comes down to" and Don Richardson, who testified that Jeff said, "they posted it all over Facebook. What's a guy supposed to do" (Tr. 326-328, 332-337).

Janet Montez was at the movie with her husband, Juan, and saw all three participants standing at the corner of the building (Tr. 289-290, 303-304). Jeff had his hands in his pockets and they were arguing; he said "we'd been married twenty-one years, how could you post that on Facebook" (Tr. 290). Her husband picked her up, and she continued to watch (Tr. 291-293, 305-306). Then they saw Jeff shoot and kick Derek (Tr. 293-294, 307-308). Juan and Janet's brother-in-law, Claude Cupp, then went and had Jeff lie down on the ground until the police arrived (Tr. 294-295, 311-314, 321-323).

Officers who responded recovered seven shell casings at the scene (Tr. 264, 280). In the front seat of Jeff's car, they found a leather jacket with a cell phone

on top of it (Tr. 358). There were two handguns and an extra magazine for one of them in the car (Tr. 358-363). The other handgun was empty (Tr. 360).

The cell phone showed that Jeff had texted Michelle twice after 8:00 p.m. – "WTF" and "Where are you at" (Tr. 382). He texted Alexis, "Are you okay" to which she replied, "yeah" (Tr. 383). To Alexis: "was she wearing a black dress?" "yep" "thanks" (Tr. 383). He called Michelle, and she did not pick up (Tr. 383). He texted Alexis at 9:37: "any other posts?" "is that still on mom's page" and "I don't think she is at the theater. They may have been leaving when the post was made." (Tr. 384). At 9:45 he sent Alexis this message, "Unless … they went to the afternoon movie" (Tr. 385). Alexis texted Jeff at 10:30: "Um, someone got shot at the theaters," followed by a missed call to him, and another text, "dad, are you okay?" (Tr. 385-386).

Derek died of multiple gunshot wounds (Tr. 419). Forensic psychologist Kent Franks testified for the defense that Jeff was suffering from an acute stress disorder at the time of the shooting (Tr. 504). Under that disorder, an individual faces with a potentially traumatic and life-threatening situation will sometimes respond to that in an abnormal way (Tr. 504). The individual will experience depersonalization or dissociation, which is a common reaction during trauma (Tr. 505).

Dr. Franks testified that acute stress disorder was thought to represent the early stages of PTSD (Tr. 508). It is an abnormal reaction to a stressful situation – like watching oneself as an actor in a play (Tr. 509). A person's ability to control

their behavior would be significantly diminished – a person will snap and do something that is just completely uncharacteristic for his history – a very primitive, poorly controlled, emotionally driven part of himself surfaces and he does something that under normal circumstances he would never do (Tr. 512, 514).

Defense counsel offered an instruction on self-defense, which was refused (Tr. 645, 652-653). The instruction read:

INSTRUCTION NUMBER ___

PART A - GENERAL INSTRUCTIONS

One of the issues in this case is whether the use of force by the defendant against Derek Moore was lawful. In this state, the use of force, including the use of deadly force, to protect oneself is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the imminent use of unlawful force.

But, a person is not permitted to use deadly force unless he reasonably believes that the use of deadly force is necessary to protect himself against death or serious physical injury.

As used in this instruction "deadly force" means physical force which is used with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury.

As used in this instruction, the term "reasonably believe" means a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

PART B - CASE-SPECIFIC STATEMENT OF LAW

On the issue of self-defense as to Count I you are instructed as follows: First, if the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore, and

Second, the defendant reasonably believed that the use of deadly force was necessary to protect himself from death or serious physical injury from the acts of Derek Moore, then his use of deadly force is justifiable and he acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense under this instruction, you must find the defendant not guilty under Count I.

As used in the instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious

disfigurement or protracted loss or impairment of the function of any part of the body.

PART C - EVIDENTIARY MATTERS

Evidence has been introduced of threats made by Derek Moore against defendant. You may consider the evidence in determining who was the initial aggressor in the encounter.

If any threats against defendant were made by Derek Moore and were known by or had been communicated to the defendant, you may consider this evidence in determining whether the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

MAI-CR306.06A

Submitted by Defendant

(L.F. 68-70). During the state's closing argument, the prosecutor told the jury that the doctor said Jeff reacted "based upon fear" but he argued that instead Jeff reacted based on anger (Tr. 681). The jury returned verdicts of guilty of murder in the first degree and armed criminal action (Tr. 723, L.F. 77-78). They recommended sentences of life without parole and five years (Tr. 764, L.F. 79).

Defense counsel included in his motion for new trial error in refusing the self-defense instruction (L.F. 82-83). On June 15, 2015, the Honorable Gayle L. Crane sentenced Jeff to life without parole and a concurrent term of five years imprisonment (Tr. 767, 814, L.F. 96-99). Notice of appeal was filed that same day (L.F. 100).

POINT RELIED ON

The trial court erred in refusing to instruct the jury on self-defense, because there was substantial evidence putting that defense in issue and thus the trial court's refusal violated Jeff's rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the jury could have found that Jeff was not the initial aggressor, and he had a reasonable belief that deadly force was necessary to protect himself against an immediate danger of serious physical injury from Derek given the size disparity between them, Derek's actions leading up to the shooting, and Jeff's mental state.

State v. Avery, 120 S.W.3d 196 (Mo. banc 2003);

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992);

State v. Westfall, 75 S.W.3d 278 (Mo. banc 2002);

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Sections 556.046, 556.051 and 563.031; and

MAI-CR306.06A.

ARGUMENT

The trial court erred in refusing to instruct the jury on self-defense, because there was substantial evidence putting that defense in issue and thus the trial court's refusal violated Jeff's rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the jury could have found that Jeff was not the initial aggressor, and he had a reasonable belief that deadly force was necessary to protect himself against an immediate danger of serious physical injury from Derek given the size disparity between them, Derek's actions leading up to the shooting, and Jeff's mental state.

The trial court erred in refusing to instruct the jury on the defense of self-defense. There was a basis in the evidence for the jury to acquit Jeff based on this defense. Failing to so instruct the jury deprived Jeff of due process, a fair trial, and the right to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Standard of review

In reviewing a claim regarding a refused instruction, the reviewing court must look at the evidence in the light most favorable to the defendant. ***State v.***

Smith, 456 S.W.3d 849, 850 (Mo. banc 2015). Whether the evidence requires the giving of a self-defense instruction is a question of law. ***State v. Huffman***, 711 S.W.2d 192, 193 (Mo. App., E.D. 1986).

Quantum of proof

A defendant is entitled to an instruction on any theory that the evidence and the reasonable inferences therefrom tend to establish. ***State v. Westfall***, 75 S.W.3d 278, 280 (Mo. banc 2002). For instance, the court is required to instruct on self-defense if there is substantial evidence putting that defense in issue. ***State v. Weems***, 840 S.W.2d 222, 226 (Mo. banc 1992). When such evidence exists, a self-defense instruction is to be given whether requested or not. ***State v. Weddle***, 88 S.W.3d 135, 138 (Mo. App., S.D. 2002). "Failure to submit such an instruction constitutes reversible error." ***Weems***, 840 S.W.2d at 226.

The quantum of proof necessary to require the giving of a self-defense instruction has been variously defined as "substantial evidence;" "evidence putting it in issue;" "any theory of innocence . . . however improbable that theory may seem, so long as the most favorable construction of the evidence supports it;" "supported by evidence;" "any theory of the case which his evidence tended to establish;" "established defense;" and "evidence to support the theory." ***Weems***, 840 S.W.2d at 226, *quoting*, ***State v. McQueen***, 431 S.W.2d 445, 448-449 (Mo. 1968) (citations omitted). This Court most recently referred to that quantum of proof as "substantial evidence," ***Smith***, 456 S.W.3d at 852. "Substantial

evidence" is "evidence putting a matter in issue." ***State v. Avery***, 120 S.W.3d 196, 200 (Mo. banc 2003). Citing ***State v. Westfall***, 75 S.W.3d 278, 280-281 (Mo. banc 2002), the Eastern District Court of Appeals has referred to it as "*any* substantial evidence," which makes clear that the word "substantial" refers to "matters of substance" rather than a quantification of the proof required. *See*, ***State v. Amschler***, 477 S.W.3d 10, 13 (Mo. App., E.D. 2015).[3]

Question for the jury

In determining whether there was substantial evidence, this Court must consider the evidence in the light most favorable to the defendant. ***Weems***, 840 S.W.2d at 226. If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it. ***Westfall***, 75 S.W.3d at 280. Any conflict in the evidence is to be resolved by a

[3] "Substantial evidence" means evidence which, if true, would have a probative force upon the issues. The term "substantial evidence" implies and comprehends competent, not incompetent evidence. ***State ex rel. Rice v. Pub. Serv. Comm's***, 359 Mo. 109, 114, 220 S.W.2d 61, 64 (1949) (internal citations omitted). "Substantial evidence" is evidence that if true has probative force upon the issues; it includes only competent evidence, not incompetent evidence. ***Knapp v. Missouri Local Gov't Employees Ret. Sys.***, 738 S.W.2d 903, 913 (Mo. App., W.D. 1987).

jury properly instructed on self-defense. ***State v. Zumwalt***, 973 S.W.2d 504, 507 (Mo. App., S.D. 1998).

Substantial evidence of self-defense requiring instruction may come from the defendant's testimony alone. ***Westfall***, 75 S.W.3d at 280. "Moreover, an instruction on self-defense must be given when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony." ***Id***. at 280-281. Jurors may accept part of a witness' testimony while disbelieving other portions. ***State v. Redmond***, 937 S.W.2d 205, 209 (Mo. banc 1996). Jurors may also draw certain inferences from a witness's testimony, but reject others. ***Id***. Jury instruction as to all potential defenses is so essential to ensure a fair trial that if a reasonable juror could draw inferences from the evidence presented, the defendant is not required to put on affirmative evidence to support a given instruction. ***Westfall***, 75 S.W.3d at 281 (*citing*, ***State v. Santillan***, 948 S.W.2d 574, 576 (Mo. banc 1997)).

Furthermore, once self-defense is injected into a case, it becomes the state's burden to disprove it. ***State v. Minnis***, 486 S.W.2d 280, 284 (Mo. 1972). The burden of establishing the guilt of the defendant, which—when substantial evidence of self-defense appears—includes that the homicide was without justification, rests with the state throughout and never shifts to the defendant. ***Id.,*** *citing* ***State v. Robinson***, 255 S.W.2d 798, 799 (Mo. 1953). It is a special negative defense, and the state has the burden to disprove it. Section 563.031.5 (defendant has the burden of injecting); Section 556.051 (where that phrase is used, any

reasonable doubt on the issue requires a finding for the defendant on that issue).

Compare the special negative defense of claim of right. In ***State v. January***, 176 S.W.3d 187 (Mo. App., W.D. 2005), the defendant appealed her convictions of burglary and stealing on the grounds that the trial court improperly denied a claim of right instruction. In reversing, the Court noted:

> In contending that the appellant did not inject the issue of a claim-of-right defense, requiring the trial court to instruct the jury on that issue, the State is essentially arguing that the trial court could consider its evidence of alleged facts that demonstrated that the appellant did not have an honest belief that she had a right to take the property in question. In other words, the State is contending that the trial court was not required to view the evidence in a light most favorable to the appellant in determining whether she had properly injected the issue of the claim-of-right defense, but could consider facts that were in dispute. Of course, this would require the trial court to assume the traditional role of the jury of determining disputed facts, including making credibility calls. Logically, weighing the competing evidence as to the issue of whether the appellant had an honest belief that she had a right to take the alleged stolen property would be for the jury in determining the ultimate issue of the claim-of-right defense, once instructed upon.

Id. at 195.

And since the state bears the burden of proof to counter the special negative defense of self-defense, is the trial court allowed to refuse to give that instruction solely because it determines that no reasonable juror could find that the absence of self-defense had been proved beyond a reasonable doubt? "The answer is no. Unless waived, the right to trial by jury means that the jury—and only the jury—will decide what the evidence does and does not prove beyond a reasonable doubt." ***State v. Jackson***, 433 S.W.3d 390, 402 (Mo. banc 2014).

Self-defense and deadly force

Self-defense is a person's right to defend himself against attack. ***State v. Chambers***, 671 S.W.2d 781, 783 (Mo. banc 1984). That right is codified in Section 563.031. Under that section, a person may use physical force upon another person when and to the extent he reasonably believes such force to be necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful force by such other person, unless the defender was the initial aggressor. Section 563.031.1. A person may not use deadly force upon another person under these circumstances unless he reasonably believes such deadly force is necessary to protect himself against death, serious physical injury, or any forcible felony. Section 563.031.2.

This Court has used a four-factor test in determining whether there is substantial evidence entitling a defendant to the submission of a self-defense instruction where deadly force was used. The reviewing court looks to

> (1) an absence of aggression or provocation on the part of the defender, (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death, (3) a reasonable cause for the defender's belief in such necessity, and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life.

Chambers, 671 S.W.2d at 783. But as the dissent pointed out in the case below, a question remains whether this test is inconsistent with Section 563.031.2, which does not include this four-factor test. ***State v. Bruner***, No. SD33982, Mo. App., S.D. (filed August 3, 2016), dissenting opinion slip at 10, n. 11, Lynch, J., dissenting. Judge Lynch noted that the four-factor test appeared to originate in a Court of Appeals case from 1975, which was decided four years before Section 563.031 became effective. ***Id***., *citing* ***State v. Jackson***, 522 S.W.2d 317, 319 (Mo. App., St.L.D. 1975). That case did cite other, earlier cases for each factor, and compiled them into a test. ***Id***.

Facts

Defense counsel offered an instruction on self-defense, which was refused (Tr. 645, 652-653). The instruction read:

INSTRUCTION NUMBER ___

PART A - GENERAL INSTRUCTIONS

One of the issues in this case is whether the use of force by the defendant against Derek Moore was lawful. In this state, the use of force, including the use of deadly force, to protect oneself is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the imminent use of unlawful force.

But, a person is not permitted to use deadly force unless he reasonably believes that the use of deadly force is necessary to protect himself against death or serious physical injury.

As used in this instruction "deadly force" means physical force which is used with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury.

As used in this instruction, the term "reasonably believe" means a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

PART B - CASE-SPECIFIC STATEMENT OF LAW

On the issue of self-defense as to Count I you are instructed as follows: First, if the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore, and

Second, the defendant reasonably believed that the use of deadly force was necessary to protect himself from death or serious physical injury from the acts of Derek Moore, then his use of deadly force is justifiable and he acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense under this instruction, you must find the defendant not guilty under Count I.

As used in the instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

PART C - EVIDENTIARY MATTERS

Evidence has been introduced of threats made by Derek Moore against defendant. You may consider the evidence in determining who was the initial aggressor in the encounter.

If any threats against defendant were made by Derek Moore and were known by or had been communicated to the defendant, you may consider this evidence in determining whether the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

MAI-CR306.06A

Submitted by Defendant

(L.F. 68-70). During the state's closing argument, the prosecutor told the jury that the doctor said Jeff reacted "based upon fear" but he argued that instead Jeff reacted based on anger (Tr. 681). Even the state acknowledged that Jeff had a defense of self-defense based on the doctor's testimony.

Based upon Jeff's testimony, which was enough to support giving the instruction, Michelle's testimony, and Dr. Franks' testimony, the trial court erred in not submitting a self-defense instruction. Jeff testified that when he approached Derek and Michelle at the movie theater, Michelle said "I don't need your permission" to be "on a date" (Tr. 593). Derek said "she moved out, pal" (Tr. 594). He moved in close, and Jeff stepped back (Tr. 594). When Jeff asked Michelle how she could put this on Facebook for their daughter to see, Derek again moved toward Jeff, who is 5'10", saying "who the fuck are you" (Tr. 594).

Derek, who was 6'4" or 6'5" and a football coach at Missouri Southern State University, kept cursing and approaching, and Jeff kept stepping back (Tr. 595). Jeff kept trying to talk to Michelle, and Derek kept interrupting (Tr. 595). Derek said "I'm not from here, mother fucker, I'll have your throat slit in two hours" (Tr. 598-599).

Derek stepped up onto the median, which Jeff remained on the asphalt (Tr. 599, 638). Jeff asked, "[W]hy are you threatening me?" Derek replied, "I don't play these redneck games." (Tr. 599). According to Jeff, he saw "some kind of motion right before the shots were fired … I know there was some kind of motion that he made." (Tr. 629). Derek took what Jeff called a "fighting stance … sideways looking at" Jeff, with Derek's right shoulder closer to Jeff and Jeff "saw his right arm move" (Tr. 638). Jeff thought that Derek was trying to grab him and he backed up (Tr. 638-639). Derek said, "you don't know who the fuck you are messing with" (Tr. 626, 638).

Jeff testified that he remembered seeing the gun come out and seeing one or two shots and hearing three (Tr. 600). It was as if everything started closing in on him (Tr. 600). His vision went and he felt sick; he did not have a clear memory of the shooting or what followed (Tr. 600-602). The next thing he remembered was sitting in the car holding the steering wheel (Tr. 602). He did not plan to kill Derek; he just wanted to talk to his wife and save their marriage (Tr. 603-604).

Michelle testified that when she and Derek left the theater, Jeff approached them and asked why she would post that to Facebook (Tr. 479). Derek stepped in,

and there was an argument between him and Jeff (Tr. 480). Derek was "cussing pretty bad," saying "fuck you" to Jeff (Tr. 480-481). Michelle tried to step between them (Tr. 481). Derek stepped up on the concrete divider, and turned back to say to Jeff, "you don't know who the fuck you're messing with" (Tr. 482). According to Michelle, the shots were fired immediately after (Tr. 482).

Dr. Franks testified defense that Jeff was suffering from an acute stress disorder at the time of the shooting (Tr. 504). Under that disorder, an individual faces with a potentially traumatic and life-threatening situation will sometimes respond to that in an abnormal way (Tr. 504). The individual will experience depersonalization or dissociation, which is a common reaction during trauma (Tr. 505).

Dr. Franks testified that acute stress disorder was thought to represent the early stages of PTSD (Tr. 508). It is an abnormal reaction to a stressful situation – like watching oneself as an actor in a play (Tr. 509). A person's ability to control their behavior would be significantly diminished – a person will snap and do something that is just completely uncharacteristic for his history – a very primitive, poorly controlled, emotionally driven part of himself surfaces and he does something that under normal circumstances he would never do (Tr. 512, 514).

Facts make this a jury question

The jury could have found that Jeff had a reasonable belief that deadly force was necessary to protect himself against death or serious physical injury. Section 563.031.2. As the dissent noted, the jury "could have found that [Jeff] had a reasonable belief that deadly force was necessary based on his testimony that [Derek], a much larger man, backed [Jeff] up until he was close to tripping over a sidewalk median, circled around him, told [Jeff] that he would 'have [his] throat slit within two hours' assumed a fighting stance, and then moved his right arm toward [Jeff]." Dissent, slip op. at 8. Judge Lynch hypothesized that the jury could have found Jeff reasonably believed that Derek was about to slit his throat and he needed to use deadly force to prevent that. ***Id***. But even more, Jeff could simply have believed Derek intended to punch him. Could a punch cause serious physical injury? Was Jeff reasonable in believing that it could, and that it was necessary for him to use deadly force? These were *jury* questions. "Reasonable" is a fact question – it is in the jury instruction. MAI-CR306.06A.

And even under the four-factor test, Jeff presented substantial evidence to support giving the instruction. The majority opinion below emphasized the word "substantial" in its analysis, slip op. at 7, and found the evidence "woefully unconvincing." Slip op. at 10, *citing* ***State v. Chambers***, 714 S.W.2d 527, 531 (Mo. banc 1986). But as discussed above, the standard is not whether this Court is convinced. "When a court decides what instructions to give the jury in a criminal case under section 556.046 based on what a reasonable juror must and must not

find, or what a reasonable juror must and must not infer, it tacks far too close to the forbidden waters of directing a verdict in a criminal case." ***Jackson***, 433 S.W.3d at 401.

A jury could have found, as the dissent did, that there was evidence of "an absence of aggression or provocation on the part of" Jeff in that Derek initiated physical aggression by repeatedly moving toward Jeff, having to be restrained by Michelle, threatening to slit Jeff's throat, assuming a fighting stance, and raising his hand toward Defendant in a manner consistent with that threat. Dissent slip op. at 11, *citing* ***Chambers,*** 671 S.W.2d at 783. A jury could have found that there was evidence of "a real or apparently real necessity for Jeff to kill in order to save himself from an immediate danger of serious bodily injury or death, as Derek told Jeff, "I will have your throat slit within two hours[,]" and Jeff believed him. "In the next instant, which was within the threatened two-hour period, Moore assumed a fighting stance and Defendant saw Moore's right arm move toward him." Dissent slip op. at 11. A jury could have found evidence of a reasonable cause for Jeff's belief in such necessity, since Derek was much larger than Jeff, Derek stepped up on the median and towered over Jeff standing on the asphalt. Dissent slip op. at 11-12 ("Whether shooting Moore was a *reasonable* action given Moore's size and conduct was for the jury to determine").

> Finally, there was evidence of "an attempt by [Defendant] to do all within his power consistent with his personal safety to avoid the danger and the need to take a life." Defendant testified that he backed up "countless times"

> as Moore continued to come toward him until Defendant was close to ripping over a "sidewalk median." Defendant's testimony supports that he attempted to take *some* action to avoid taking Moore's life. Whether it was "*all* within his power" (emphasis added) was for the jury to decide.

Dissent, slip op. at 12.

This Court cannot act as a "super juror." ***State v. Brinkley***, 366 S.W.3d 104, 105 (Mo. App., S.D. 2012). Once there was any substantial evidence to support Jeff's sole defense – self-defense – the instruction should have been given to the jury. Jeff was prejudiced by the trial court's error in refusing to instruct the jury on self-defense and thereby hold the State to its burden of proving beyond a reasonable doubt that Jeff did not act in lawful self-defense. The trial court should have left it to the jury to decide this critical question.

Jeff's conviction of murder in the first degree must be reversed and remanded for a new trial. Furthermore, since armed criminal action requires the commission of an underlying felony, Jeff's conviction for that offense must also be reversed and remanded for a new trial. ***Weems***, 840 S.W.2d at 222.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

/s/ Ellen H. Flottman

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone: (573) 777-9977, ext. 323
FAX: (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,354 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 31st day of August, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were served through the Missouri e-Filing System on Rachel Flaster, Assistant Attorney General, at Rachel.Flaster@ago.mo.gov.

/s/ Ellen H. Flottman

_____

Ellen H. Flottman